1894.

JAGMOHAN-DÁS KILÁBHÁI v. ALLU MARIA DUSKAL.

family is admitted or proved to be joint; but there is no direct evidence before the Court as to the nature of the debt. We gather from the Madras judgment, that the Court considered that in that case there would be no presumption that the debt was a family debt. But we think that view is irreconcileable with the decision in *Taruck Chunder* v. *Jodeshur Chunder*[1], which has always been followed in this Court.

We must, therefore, in the exercise of our extraordinary jurisdiction make absolute the rule *nisi* and reverse the decree of the Court below, and send back the case for a fresh decision having regard to the above remarks. Costs to abide the result.

Rule made absolute and case sent back.

(1) 11 Beng. L. R., 193.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Farran.

1894.
November 12.

IN RE NA'GARJI TRIKAMJI.*

Penal Code (Act XLV of 1860), Sec. 499, Exception 9—Defamation—Privilege of counsel—Good faith—Construction—Construction of statute.

A pleader, in addressing a Ma'mlatdár on behalf of his client, who was charged under section 125 of the Bombay Land Revenue Code (Bom. Act V of 1879) with wilfully removing boundary marks, commented on some of the witnesses for the prosecution, and called them loafers. Thereupon one of those witnesses prosecuted the pleader for defamation. The Magistrate held that there was no justification for the language, and convicted the pleader, and sentenced him to pay a fine of Rs. 15 under section 500 of the Indian Penal Code (XLV of 1860).

Held, reversing the conviction and sentence, that in the absence of express malice (which was not to be presumed) the pleader was protected by exception 9 to section 499 of the Indian Penal Code.

Held also that in considering whether there was good faith (*i.e.* due care and attention) the position of the person making the imputation must be taken into consideration. In the case of an advocate, where express malice is absent, a Court having due regard to public policy would be extremely cautious before depriving him of the protection of exception 9 to section 499 of the Indian Penal Code.

Semble.—Section of the Indian Penal Code should be construed without reference to the English law.

*Criminal Review, No. 214 of 1894.

1894.

IN RE NA'GARJI TRIKAMJI.

THIS was an application for the exercise of the High Court's revisional jurisdiction under section 439 of the Code of Criminal Procedure (Act X of 1882).

The accused, who was a pleader practising in the district of Surat, was charged with defamation under section 499 of the Indian Penal Code under the following circumstances :—

One Máneklál Pránshankar filed a complaint against Abdul Kádar under section 125 of the Bombay Land Revenue Code (Act V of 1879) for wilfully removing certain boundary marks.

The Mámlatdár of Chorási, who held a summary inquiry into this complaint, examined certain witnesses on behalf of the prosecution, one of whom was Narsirám Harderám, the complainant in the present case.

The accused, who defended Abdul Kádar, in commenting on the witnesses for the prosecution called them "loafers."

Thereupon Narsilál filed the present complaint against the accused, charging him with defamation.

The accused pleaded that the occasion was privileged.

The case was tried by the First Class Magistrate of Surat, who was of opinion that the accused was not justified in calling the complainant a loafer.

The accused was convicted of defamation under section 500 of the Indian Penal Code, and sentenced to pay a fine of Rs. 15. The judgment was as follows :—

"The accused in his defence has raised two main issues, *viz.* :—

"1st, that as a pleader it was his privilege to comment on the evdence of witnesses, and if it be considered proved that the complainant was called a 'loafer,' he had not gone beyond the limit of his privilege. 2nd, that the word 'loafer' used by him was not intended for complainant, but a *dhed* witness.

"I have seen the authorities quoted *pro* and *con*, and I do not think a vakil has the privilege of calling a witness who gives evidence against his client a loafer without any justification. The complainant Narsilál is a respectable man and a Government servant, and it was certainly likely to make him look small in the eyes of his friends and acquaintances to call him a loafer.

1894.

IN RE NA'GARJI TRIKAMJI.

It is not necessary that he should be actually degraded. It has been hinted that he has been spending several hours in the company of Máneklál in idle gossip, and as the word 'loafer' has been defined in Webster's Dictionary as an idle man, there was no harm in calling the complainant a loafer. Loafer really means a vagrant, one who has no means of subsistence. The complainant is not of that stamp. Every one has his friend or club to go to, where he spends his leisure in merry talk, and that does not make him a loafer.

"It appears clear, from the Mámlatdár's evidence, that the complainant was one of those who were called loafers.

"The head surveyor said nothing in favour of Máneklál, and, therefore, comments made by the vakil were intended for the three witnesses who gave evidence in favour of Máneklál. The Mámlatdár says the word 'loafer' was used more than once, and it had reference to the complainant, who gave evidence against the vakil's client. The vakil's evident object in calling him a loafer was either that he might be disbelieved, or to pay off some private grudge, as the complainant says on solemn affirmation that the vakil told him once that he would mark him.

"The defence also insinuate that the accused is prosecuted because there is ill-feeling between his family and the vakil Kirpárám's family, by whom he has been instigated to lodge the complaint. This argument cuts both ways. It shows also the *mala fides* of the accused, who to take revenge on account of his animosity with Kirpárám's family called complainant a loafer, as he has some connection with the latter family.

"I, thèrefore, convict Nágarji Trikamdás under section 500 of the Indian Penal Code and sentence him to pay a fine of Rs. 15."

Against this conviction and sentence the accused applied to the High Court under section 435 of the Code of Criminal Procedure (Act X of 1882).

Goverdhanrám M. Tripáthi for accused :—Section 499 of the Indian Penal Code has no application to the present case. A counsel stands in the same position and is entitled to the same protection as a Judge, a witness, or a party to a judicial proceed-

ing. A counsel speaks not from his own knowledge, but under instructions. He is a mere mouthpiece of his client. It is his duty to argue his client's case to the best of his ability. An argument is, therefore, not an imputation within the meaning of section 499 of the Penal Code. A counsel is often compelled in the discharge of his duty to make unfavourable comments or disparaging remarks on his adversary's case. But that will not make him liable to a civil suit or a criminal prosecution. For words spoken by him in his character as an advocate he enjoys an absolute privilege, and this privilege is founded on public policy—*Munster* v. *Lamb*(1); *Rex* v. *Skinner*(2); *Dawkins* v. *Lord Rokeby*(3); Odger on Libel and Slander (2nd Ed.), p. 436. The law on this point is the same here as it is in England—*Sullivan* v. *Norton*(4); *Queen-Empress* v. *Bábáji*(5); *Queen-Empress* v. *Bálkrishna*(6). I adopt Fulton J.'s] argument in the last case and contend that the case does not fall under section 499 of the Penal Code. I do not rely on any of the exceptions to that section. Even if the privilege be qualified, the *onus* lies on the prosecution to prove express malice. This has not been found in the present case.

Gokuldás Kahándás Párikh for complainant:—The Magistrate has found that the accused made the imputation complained of without any justification whatever. I submit it is wrong to refer to English cases in construing the Indian Penal Code—*Abdul Hakim* v. *Tej Chandar Mukarji*(7). The English law is based on public policy. But public policy cannot override the plain language of an enactment like the Penal Code. The language of section 499 of the Code is wide enough to include the case of counsel. If his words amount to an imputation, the section would apply, no matter whether the imputation be in the form of an argument or not—*Reg.* v. *Káshináth Dinkar*(8); *Green* v. *Delanney*(9); *Queen* v. *Pursorám*(10); *Hinde* v. *Baudry*(11). The observations of Fulton, J., in *Queen-*

(1) 11 Q. B. D., 588 at p. 603.
(2) Lofft, 55.
(3) L. R., 7 H. L., 744.
(4) I. L. R., 10 Mad., 28.
(5) I. L. R., 17 Bom., 127.
(6) I. L. R., 17 Bom., 573.
(7) I. L. R., 3 All., 815.
(8) 8 Bom. H. C. Rep., 126 Cr. Cas.
(9) 14 Cal. W. R., 27 Cr. Rul.
(10) 3 Cal. W. R., 44 Cr. Rul.
(11) I. L. R., 2 Mad., 13.

1894.

IN RE NA'GARJI TRIKAMJI.

Empress v. *Bálkrishna*[1] are, I submit with due deference, erroneous. Even if they are correct, they do not apply to the present case. The case of a witness is different from that of a counsel. A witness is compelled by law to make a statement, whether defamatory or not, in answer to questions put to him in the witness box. A counsel does not speak under such compulsion. A witness is, moreover, liable to a prosecution for perjury if he makes a false statement. A counsel is exposed to no such risk. A counsel is, therefore, bound to speak with due care and caution. If he makes reckless imputations, he will be liable to a prosecution for defamation. In a case like this the *onus* lies on the accused to prove good faith; and he is bound to show that his case falls within one or another of the exceptions to section 499 of the Penal Code. The case of *Sullivan* v. *Norton*[2] is not in point, as it was not a case of defamation under the Indian Penal Code.

PER CURIAM:—The facts found are that the accused's pleader, in addressing the Mámlatdár on behalf of his client accused under section 125 of the Land Revenue Code, of removing boundary marks, commented on some of the witnesses on the other side and called them loafers. One of them accused the pleader of defamation under the Indian Penal Code.

The Magistrate has convicted and fined him, holding that the word means a vagrant or one who has no means of subsistence; that it was used either to discredit the witness or to pay off some private grudge; and that the authorities cited did not extend the protection of privilege to the accused. Mr. Govardhanrám has argued that the conviction is bad. A counsel or advocate of any sort speaks, he says, not from knowledge but instructions, is thus a mere mouthpiece as regards assertions, and as regards comments is bound to duty to his client. Therefore an argument is not "imputation" within the section 499 of the Indian Penal Code defining the offence of defamation. Without relying on any of the exceptions, the learned pleader adopts fully the reasoning applied in *Queen-Empress* v. *Bálkrishna*[1] by Fulton, J., about a witness. He relies also on the reasoning in

(1) I. L. R., 17 Bom., 573. (2) I. L. R., 10 Mad., 28.

Sullivan v. *Norton*[1], and the *dictum* at p. 35 that an advocate in this country cannot be proceeded against criminally for words uttered in his office as advocate. He contends that an advocate stands in the same position as a witness and that section 499 should be interpreted so as to accord with the public policy affirmed by the law of England which has always treated witnesses and advocates as alike exempt from suit for what of a defamatory nature they may say in the course of their advocacy or evidence.

The case of *Dawkins* v. *Lord Rokeby*[2] in the House of Lords is cited as conclusive upon the question as to witnesses, and the cases of *Seaman* v. *Nethercliff*[3] and *Goffin* v. *Donnelly*[4] referred to as examples of the application of the rule. This principle has been extended, it is said, to advocates for the same reason, and the case of *Munster* v. *Lamb*[5] is relied on as establishing that proposition. We think there can be no doubt that these cases do establish the propositions for which they are cited. Brett, M. R. (Lord Esher), says, p. 603: "Of the three classes—Judge, witness and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of an argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that

(1) I. L. R., 10 Mad., 28.
(2) L. R., 7 H. L., 744.
(3) 1 C. P. D., 540; 2 C. P. D., 53
(4) 6 Q. B. D., 307.
(5) 11 Q. B. D., 588.

1894.

IN RE NA'GARJI TRIKAMJI.

rule covers a counsel even more than a Judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting *bonâ fide* may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and, therefore, it is better to make the rule of law so large that an innocent counsel shall never be troubled, although, by making it so large, counsel are included who have been guilty of malice and misconduct.

"In *Rex* v. *Skinner*[1], Lord Mansfield, a Judge most skilful in enunciating the principles of the law, treated a counsel as standing in the same position as a Judge or a witness. In *Dawkins* v. *Lord Rokeby* [2] a most careful judgment was delivered on behalf of all the Judges in the Exchequer Chamber, and the opinion of Lord Mansfield was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with Judges and witnesses. I will refer to *Kennedy* v. *Hilliard*[3], and in that case Pigott, C. B, delivered a most learned judgment, in the course of which he said, at p. 209: 'I take this to be a rule of law, not founded (as is the protection in other cases of privileged statement) on the absence of malice in the party sued, but founded on public policy which requires that a Judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a Court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.' Into the rule thus stated the word *counsel* must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the question of malice *bona fides* and relevancy cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution

(1) Lofft, 55.

(2) L. R., 8 Q. B., 255 at pp. 263, 264, 268.

(3) 10 Ir. C. L. R., 195.

can be maintained against a defendant when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any Court of justice into any matter concerning the administration of the law."

We have now to consider, in connection with the case before us, how far the above interpretation of the common law of England has been adopted in India. In *Baboo Gunnesh* v. *Mugneerám*[1] the rule that a witness is not liable to a civil action for defamatory words spoken in the course of his evidence has been laid down as applicable to India; this has been followed in *Náthji* v. *Lálbhai*[2], where the rule is extended to pleadings. In *Manjaya* v. *Sesha Shetti*[3], these views of public policy as interpreting the common law are adopted in regard to prosecutions under the Indian Penal Code for defamation; the only proper prosecution is held to be that for giving false evidence. This case is followed by Birdwood and Parsons, JJ., in *Queen-Empress* v. *Bábáji*[4]; and in *Queen-Empress* v. *Bálkrishna*[5], Fulton, J., (Telang, J., *dubitante*) held that the case of a witness lay outside the scope of section 499, on the ground that it was not the intention of the Legislature to bring statements made in the witness-box within the definition of defamation. The impolicy and the hardship on the witness as also other considerations were relied on in support of that view. We are inclined to share the doubts expressed by Telang, J. The case of *Greene* v. *Delanney*[6] shows that this section of the penal statute must be construed without reference to the English law (based on public policy). The *Queen* v. *Parsorám*[7] is to the same effect. *Sullivan* v. *Norton* is not an interpretation of section 499; although as to the extent of an advocate's privilege in England the learned Judges had *Munster* v. *Lamb* to guide them.

The extent of the witness's privilege is not as yet so clearly settled—see Lord Bramwell's *dictum* in *Seaman* v. *Netherclift*[8]; and in *Queen-Empress* v. *Bálkrishna*, Fulton, J., refrains from laying

(1) 11 Beng. L. R., 321 (P. C.)
(2) I. L. R., 14 Bom., 97.
(3) I. L. R., 11 Mad., 477.
(4) I. L. R., 17 Bom., 127.
(5) I. L. R., 17 Bom., 573.
(6) 14 Calc. W. R., 27 Cr. Ca.
(7) 3 *Ibid.* 44.
(8) 2 C. P. D., 53 at p. 60.

1894.

IN RE NA'GARJI TRIKAMJI.

down that wholly irrelevant statements of a witness may not come within the scope of the enactment we are now considering. It would then be difficult, in the present state of the authorities, to state with reference to these decisions the limits of the privilege they concede to witnesses charged criminally for defamation. It would, however, in our opinion, be beyond the province of mere interpretation to engraft a new exception on the definition.

The Legislature has enacted a general exception in favour of Judges,—to wit, section 77 of the Penal Code, and in section 132 of the Indian Evidence Act has gone a certain length in protecting witnesses against the criminal law; it may be assumed that it had no intention of going further. As stated in Macaulay's Report on the First Draft of the Penal Code, the requirement of "good faith" was intentional in section 499. Without, however, importing into this carefully considered statute the rules of the common law of England based on public policy, we are of opinion that a witness in India is adequately protected by the exceptions 1 to 9 in section 499, where the defamatory statement is not untrue to the knowledge of the person making it. If, however, it be untrue to his knowledge, the real offence committed is, as pointed out by the Privy Council in *Baboo Gunnesh* v. *Mugneerám* (*supra*), that of false evidence; and the Court would not, when such is the offence, allow the *onus* of proof to be shifted by the prosecution having recourse to section 499, as that would be tantamount to dispensing with the salutary provisions of section 195 of the Code of Criminal Procedure, which are clearly based on public policy. It has been pointed out in *Queen-Empress* v. *Gundya*[1] that it is an invasion of the law to treat an aggravated as an ordinary offence, and thus introduce a different jurisdiction or a lower scale of punishment. This applies as between defamation and the various givings of false evidence, all more severely punishable under section 193 to 195 of the Penal Code; it applies to the making of the charge under sections 210 and 254 of the Procedure Code. In the present case it is unnecessary to decide whether advocates have or have not the unqualified privilege from criminal prosecution which the case of *Sullivan*

(1) I. L. R., 13 Bom., 502.

1894.

IN RE NÁGARJI TRIKAMJI.

v. *Norton* would accord to them. We only follow the practice of the Court by interfering in revision, *Queen-Empress* v. *Slater*, per Candy, J.[1], where there is sufficient reason, as *e.g.* where the lower Court has approached the case from a wrong point of view. The record does not show what authorities were cited to the Magistrate. There is no discussion in it of the peculiar duty of an advocate. The judgment does not determine the motive, and there is no finding of express malice, and we have not to consider such a case.

The present case is, in our opinion, covered by exception 9 to section 499. In considering whether there was good faith, *i.e.* under section 52, due care and attention of the person making the imputation must be taken into consideration. That of an advocate is well expressed by the Master of the Rolls in the passage cited above. He speaks from instructions; he reasons from facts somtimes true, sometimes false. He draws inferences from these facts sometimes correct, sometimes fallacious. He does not express his own inferences, his own opinions or his own sentiments, but those which he desires the tribunal, before which he appears, to adopt. This duty the law allows, almost compels him to perform. Such being his duty, it seems to us that where express malice is absent (and it ought not to be presumed) a Court having due regard to public policy would be extremely cautious before it deprived the advocate of the protection of exception 9. In the present case we do not doubt that this protection applies. We, therefore, set aside the conviction and sentence.

Conviction set aside.

(1) I. L. R., 15 Bom., 351, at p. 365